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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1016. 69

C. A. ROSS, AGENT, INC., a corporation of North Carolina, (amended by order of the Court to read ROSS MOTOR LINES, INC.),

Petitioner,

vs.

LOUIS VENUTO, Administrator *ad Prosequendum* and General Administrator of the Estate of ELVIRA VENUTO, deceased, and Administrator *ad Prosequendum* and General Administrator of the Estate of ANNA VENUTO, deceased, FLORENCE VENUTO, VITO CUOZZO and MARIE CUOZZO,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI.

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Petitioner,

vs.

LOUIS VENUTO, Administrator *ad Prosequendum* and General Administrator of the Estate of ELVIRA VENUTO, deceased, and Administrator *ad Prosequendum* and General Administrator of the Estate of ANNA VENUTO, deceased, FLORENCE VENUTO, VITO CUOZZO and MARIE CUOZZO,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorables, THE CHIEF JUSTICE *and* ASSOCIATE JUSTICES *of the Supreme Court of the United States:*

The respondents, Louis Venuto, administrator *ad prosequendum* and general administrator of the Estate of Elvira Venuto, deceased, and administrator *ad prosequendum* and general administrator of the Estate of Anna Venuto, deceased, and Florence Venuto, respectfully pray that the

petition of the Ross Motor Lines, Inc., petitioner herein, be dismissed and that a writ of certiorari be denied, on the following ground:

This Court in the exercise of its discretion should decline to grant a writ of certiorari.

Statement of the Case.

Ross Motor Lines, Inc., the petitioner herein, was engaged in the motor transportation business since May 8, 1936 and was lawfully authorized to and did operate as a common carrier between Gastonia, N. C. and New England points covering approximately eleven States (R. p. 125, supplemental appendix).

The Ross Motor Lines hired Robinson to haul freight for the company and it appeared that between January, 1937 and July 3, 1937 Robinson worked exclusively for the Ross Co. and was kept busy and occupied all of the time (R. p. 100, supplemental appendix).

It further appeared that on the day of the accident Robinson was hauling a load of Kress merchandise which the Ross Co. had contracted to ship for the Kress Company. The load of merchandise was covered by bills of lading issued by the Kress Company and were signed and receipted by Mr. Herman, dispatcher of the Ross Co., as having been received by the Ross Co. as a common carrier for shipment for the Kress Co. The bills of lading (P-9, P-11), set forth that the load was to be hauled over the route of the Ross Co. (R. p. 54, supplemental appendix; pp. 13 and 16, appellees' appendix).

The waybills or freight bills (P-9, P-39, P-11) covering the shipment hauled by Robinson were prepared by Mr. Herman on printed forms of the Ross Co. and carried the rates of the Ross Co. which were set forth in its tariff on file

with the Interstate Commerce Commission (R. p. 54, supplemental appendix; pp. 14, 15 and 17, appellees' appendix). It also appeared that Mr. Herman inserted the name of Robinson above the printed word "driver" in the lower left hand corner of the freight bills where the following printed language appeared,

> "Received above articles for delivery as shown C. A. Ross, Agent, Inc.
>
> By L. L. Robinson
> Driver."

and that Robinson signed his own name in the lower right hand corner where the following printed language appeared,

> "Received payment for the Company
>
> L. L. Robinson."

Mr. Herman also prepared a "manifest" (P-10) on the printed form of the Ross Co. covering the entire load carried by Robinson and inserted the name of Robinson in the upper right hand corner above the printed word "driver" (R. p. 55, supplemental appendix; p. 16, appellees' appendix).

The testimony further revealed that Robinson received instructions from Mr. Ross, president of the Ross Co., on his northbound trips (R. pp. 5 and 6, appellees' appendix) and took orders from Mr. Herman on his southbound trips (R. pp. 10 and 11, appellees' appendix). Mr. Herman always checked the freight carried by Robinson and helped to load Robinson's trailer on the day of the accident (R. p. 53, supplemental appendix).

It further appeared that the equipment owned by Robinson was leased to the Ross Co. as set forth in his application for authority to engage in business as a com-

mon carrier (R. pp. 11 and 12, appellees' appendix; p. 107, supplemental appendix); and that the equipment described in the Ross Co. application as having been leased by "others" to the Ross Co., was owned by Robinson (R. pp. 147 and 148, supplemental appendix).

The proofs at the trial further showed that Robinson had no tariff of his individual issue nor was he a party to any agency tariff filed with the Interstate Commerce Commission on or prior to the day of the accident (R. Exhibit P-33); and that Robinson had no insurance or other security to support his comomn carrier application on file with the Interstate Commerce Commission on and prior to the day of the accident (R. Exhibit P-34).

On page 3 of his brief counsel for petitioner states that the case involves a novel and important question and is of great moment because the insurance carrier of the original motor carrier would have imposed upon it vast and ruinous liabilities which it could not anticipate in fixing its rates. This, of course, was not the issue before the Court. And even if it was, the insurance carrier in assuming the risk of insuring a common carrier under the Motor Carrier Act, 1935, knew full well that its liability on the policy and endorsement which it was required to attach to its policy (Rules and Regulations of the Interstate Commerce Commission governing policies of insurance, page 7, form B. M. C. 31), was absolute in the event a judgment was recovered against the assured or any carrier it chose to hire in its work, if the judgment recovered resulted from the negligent operation, maintenance and use of motor vehicles under its certificate of public convenience and necessity issued to the assured by the Interstate Commerce Commission, regardless of whether such motor vehicles were specifically described in the policy or not.

On page 4 of his brief counsel for petitioner states that
bstantial rights of the Ross Co. were prejudiced at the
ial because the trial judge permitted testimony concern-
g rules and regulations of the Interstate Commerce
ommission and hence allowed evidence to be introduced
hich was outside the scope and issues of the pleadings.
These proofs were offered by the respondents to show
at the Ross Co. was a common carrier and had to abide
certain rules and regulations of the Interstate Com-
erce Commission with respect to bills of lading, freight
ls and the filing and posting of its tariff. The proof
s offered to indicate that the Ross Co., a common car-
r, was complying with these rules and regulations and
show that the company, in accepting the bills of lad-
and preparing the freight bills, was conducting its own
siness and prescribing its own rates as set forth in its
iff and not the rates of Robinson.

Because Robinson testified he was an independent con-
ctor, it was important to determine whether his rates
plied to the shipment in question, whether he filed or
blished any tariff and whether he had any bills of lad-
of his own in view of the strict requirements of the
erstate Commerce Commission relating thereto, so that
jury could determine whether or not Robinson could
fully engage in an independent business of his own
a common carrier.

Reasons for Denying the Writ of Certiorari.

The decision of the Circuit Court of Appeals for the
rd Circuit did not decide any question of local law
onflict with applicable local decisions and was well
nded upon the facts appearing in the record.

The decision of the Circuit Court of Appeals for the
rd Circuit did not decide any question of Federal Law.

3. The Circuit Court of Appeals for the Third Circuit did not depart from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's power of supervision.

ARGUMENT.

POINT 1.

The decision of the Circuit Court of Appeals did not decide any question of local law in conflict with applicable local decisions and was well founded upon the facts appearing in the record.

The Circuit Court of Appeals did not err in holding the Ross Co. liable for the negligent acts of Robinson because the Ross Co., a common carrier for hire in interstate commerce, could not relieve itself of liability by delegating to Robinson the performance of its duties which it assumed and for which it was hired by the Kress Company, even though Robinson was an independent contractor.

Where the evidence shows the relation to be that of independent contractor rather than master and servant, *ordinarily* there is no liability cast upon the one who has entrusted the work to an independent contractor, from negligence in its performance. We say *ordinarily* because of our confidence that the rule does not apply and should not apply in *common carrier cases.* Where work cannot be done except by virtue of some special privilege or franchise, the obligation (it is submitted) is non-delegable; and the torts of an independent contractor render the one so attempting to delegate, liable for the harm resulting.

Sec. 428, Restatement of the Law of Torts.

The following language appears in *26 Cyc. 1564 (111):*

> "Corporations have been held liable for the wrongful acts of independent contractors while they were exercising, with the assent of the corporation, some chartered power or privilege of the corporation, but the liability is limited to wrongs done in the performance of acts which could not have been done except for the existence of the charter of the corporation."

In the case of *Meola v. Howard Savings Institution* (Errors & Appeals) 109 N. J. L. 37, 160 Atl. 416, it appeared that the savings institution owned a lot of land adjoining the plaintiff's building and it contracted with Howie, a competent contractor, to excavate its lot for the foundation of a new building; that such excavation was for a depth of approximately 9 feet below the curb level; that as a result of doing that work, as the jury evidently found, the adjoining wall of the plaintiff's building settled and damage resulted. A judgment was rendered against the savings institution and it appealed. Justice Parker, speaking for the Court, said at page 417:

> "Nor does the rule of independent contractor protect the appellant. The general doctrine relating to employment of an independent contractor in cases where the work is not in itself a nuisance is well understood and needs no discussion here; *but there are several exceptions to the rule, and one of them is that, where the duty to the public or to an individual is imposed on a party by statute or ordinance, that party cannot escape liability by delegating the work to an independent contractor.* 39 C..J. 1337, and cases cited. Blount v. Tow Fung, 48 R. I. 453, 138 Atl. 52, Newman v. Pasternack, 103 N. J. L. 434, 438, 135 Atl. 877, 50 A. L. R. 482, in which this very statute was invoked. The duty of support, where license to enter has been given (xx), is an absolute one, and the question whether care has been used is, so far as the statute is concerned, wholly irrelevant. Hirschberg v. Flusser, 91 N. J. L. 66, 102 Atl. 353, affirmed 92 N.

J. L. 515, 105 Atl. 893. *The duty, being imposed by statute, cannot be delegated by the party on whom it is imposed, and, that being so, the independent contractor feature is no part of the case.* Hussey v. Long Dock R. R. Co., 100 N. J. L. 380, 126 Atl. 314."

See *Rizzi v. Ross* (Errors & Appeals), 117 N. J. L. 362, 189 Atl. 110.

Delaware, Lackawanna & Western Rd. Co. v. Salmon (E&A) 39 N. J. L. 299.

Topf, et al. v. West Shore & Ontario Terminal Co., (Supreme) 46 N. J. L. 34.

18 R. C. L. 792, Sec. 251.

The case of *Reisman v. Public Service* cited by counsel on pages 9 to 11 inclusive of his brief, is not applicable. The exhibition of fireworks was not part of the company's business. It was not necessary for the company to secure a *permit or license* to carry on this exhibition, and, therefore, it could not be argued that the company was the only one authorized to carry on this exhibition which was performed by the independent contractor. It clearly appeared that the company did not attempt to delegate any activity, which it was only privileged or licensed to do, to the independent contractor.

The other cases cited by counsel on pages 11 to 15 inclusive are neither controlling nor applicable to the case *sub judice*. Most of these cases involved persons or corporations not engaged in the trucking business, who required the services of truckmen to make deliveries for them. *None of these persons or corporations were common carriers* and there was no duty on their part to secure any license or franchise before being duly authorized to carry on the work or activity which resulted in injury or damage to the plaintiffs in those cases. The work performed by these truck-

men could have been carried on by anyone regardless of their status.

In the case *sub judice* the Ross Co. was the carrier and hired Robinson to carry on its business for which the Ross Co. was engaged by the Kress Co. The freight was covered by bills of lading issued by the Kress Co. and receipted by the Ross Co. The freight charges were prepared by the Ross Co. based on its tariff rates. A manifest was also issued and prepared by the Ross Co. covering the entire shipment being carried by Robinson.

We respectfully submit that the Ross Co. would be liable even though Robinson was an independent contractor. Since the law compels carriers to carry public liability insurance for the protection of the public, it would certainly be a tragedy if carriers were permitted to hire irresponsible truckers to haul for them and upon the happening of an accident, be permitted to raise the defense of independent contractor. Under such circumstances how could the public be protected? The carriers could not have lawfully engaged in hauling if it were not for the authority granted them by the Interstate Commerce Commission, and, quite likely, such hired truckers in many cases would not carry public liability insurance which is required of licensed carriers. If such a defense would be permitted the carriers under such circumstances, it would be a fraud upon the public and the Government.

In the case of *Liberty Highway Co., et al. v. Callahan, et al.* (Court of Appeals—Ohio), 157 N. E. 708, reversed on other grounds, it appeared that suit was brought against Griffith whose truck, drawing a trailer (owned by defendant), was being operated by Harry Culver, an agent and employee of defendant Griffith. Griffith was operating a truck which he owned and a trailer which he rented from the defendant, Liberty Highway Co., at a cost of $7.00

per day under an arrangement with the Liberty Highway Co. for which he was to receive 68% of the charge for freightage and the Liberty Highway Co. would receive 32%. The charges on freight hauled by Griffith were collected by the Liberty Highway Co., which solicited the business and maintained freight docks.

The contention was made by the Liberty Highway Co. that the court should have directed a verdict in its favor on the theory that Griffith was not its agent or employee but that he was an independent contractor. The court held:

> "There is evidence, however, tending to show that the Liberty Highway Co. was a common carrier of freight and made the arrangement with Griffith to assist it in performing its public duty as a common carrier. We believe the correct rule to be that a corporation, which is engaged as a common carrier of freight by motor truck, and holds itself out as such to the public, cannot delegate the carrying of the goods upon the public highway by truck to a third party so as to relieve itself from responsibility for negligent acts committed in the performance of its duties as a common carrier under its charter. Public policy requires that a corporation chartered to perform the public duties of a common carrier should not be permitted to contract with parties who may be irresponsible for the performance of a part of its duties under the charter and thus avoid responsibility for the negligent performance thereof. The duties of the corporation thus chartered are nondelegable; and it is answerable for the negligent acts of persons to whom it entrusts the performance of a part of its duties, if such acts are done by them in the performance of such duties and while acting within the scope of agreement for carriage. For the reasons indicated we think that the Liberty Highway Co. was not entitled to a directed verdict."

Cites 28 A. L. R. 190, Point 3, Section 24.

The following cases support the Liberty Highway Co. case, *supra*, and illustrate the theory that a common carrier

cannot relieve itself of liability by entrusting the performance of its work to an independent contractor.

Stickel v. Erie Motor Freight Inc. (May 18, 1936), 6 N. E. (2nd) 15, 54 Ohio App. 74;
Bates Motor Transport Lines Inc. v. Mayer (April 8, 1938), 14 N. E. (2nd) 91, 213 Ind. 664;
Swallow Coach Lines Inc. et al. v. Cosgrove (May 31, 1938), 15 N. E. (2nd) 94, 214 Ind. 532;
Duncan v. Evans (see Healy case below):
Healy v. Universal Carloading & Distributing Co., 17 N. E. (2nd) 913, 134 Ohio St. 486 (November 30, 1938), aff. 20 N. E. (2nd) 729, 60 Ohio App. 265;
Gas City Transfer Co. Inc. v. Miller (Indiana) June 13, 1939, 21 N. E. (2nd) 428;
Zifrin v. Bolitho (Ind.), 25 N. E. 2nd 679.

We respectfully submit that the decision of the Circuit Court of Appeals was not in conflict with the applicable decisions of New Jersey or deeply rooted precedence in the common law.

POINT 2.

The decision of the Circuit Court of Appeals did not decide any question of Federal law.

The suit herein was based on an ordinary negligence action. The Court did not, by its decision, decide any question of Federal law. In referring to the Motor Carrier Act, 1935, in its opinion, the Court pointed out that interstate motor carriage is now regulated by elaborate rules and regulations set out in the Act to indicate that certain requirements must be met before entitling persons or corporations to secure authority or a franchise to so operate.

We seriously questioned, at the trial, Robinson's authority to operate as a common carrier because of his failure to carry and file a policy of insurance with the Commission and the fact that he failed to file any tariff with the Commission to enable prospective shippers to determine whether or not his charges were proper and whether or not he was adhering to the rates set forth therein. We cannot, therefore, assume that Robinson was possessed of the necessary financial responsibility to perform his work as a common carrier as pointed out by counsel on page 17 of his brief.

As a matter of fact Robinson did not have any certificate from the Commission to operate as a common carrier but had merely filed an application for authority to act as a carrier. In order to be entitled to lawfully operate as such, it was necessary for him to meet the requirements of the Act, namely, to carry and file insurance and file a tariff with the Commission. This he failed to do (R. Exhibits P-33 and P-34).

Counsel points to the fact that in the *Duncan v. Evans* case on page 16 of his brief, the operator of the hired truck was not authorized and bonded as required by State law. In the companion case of *Healy v. Universal Carloading & Distributing Co.*, 134 Ohio State 486, 17 N. E. (2) 913, the Court held the initial carrier responsible even though the hired carrier had complied with the law in every respect.

POINT 3.

The Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's power of supervision.

The facts in the case *sub judice* were fully developed at the trial and the verdicts rendered therein were within the

scope of the pleadings and the Court sustained those findings on a theory which the respondents requested the trial court to submit to the jury at the trial but which the trial judge refused to do (R. bottom p. 7, Opinion).

We believed that there was an abundance of evidence establishing the relationship of master and servant in the case.

American Carrier Corp. v. Avigliano, et al., 123 N. J. L. 490, 9 A(2) 788;
Scarano v. Lindale & Victor Lynn Transportation Co., 121 N. J. L. 549, 3 A(2) 633;
Western Express Co. v. Smeltzer, (C. C. A.—6th Circuit), 88 F(2) 94;
Interstate Motor Freight Corp. v. Beecher (Ohio), 174 N. E. 27;
Laughlin v. Michigan Motor Freight Lines, 276 Mich. 545, 268 N. W. 887;
Mann v. Reliable Transit Co., et al., 217 Wisc. 465, 259 N. W. 415;
Hazard v. Great Central Transportation Corp., 270 Mich. 60, 258 N. W. 210;
Horowitz v. Daily Mirror Inc. et al., 258 N. Y. S. 39, 144 Misc. 69;
Yelloway Inc. v. Hawkins, (C. C. A.—8th Circuit).
38 F (2) 131

Nevertheless the result in the case *sub judice* can be sustained on the basis that the Ross Co. was engaged in the type of business wherein the negligence of a person employed by the company as an independent contractor is a matter for which the company is made responsible.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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